

SIVAPALAN (MIGRATION) [2025] ARTA 306 (7 MARCH 2025)

Decision and

Reasons for Decision

Applicant:	Mr Subakaran Sivapalan
Visa Applicant:	Mr Luxshan Subakaran
Respondent:	Minister for Immigration and Multicultural Affairs
Tribunal Number:	2437150
Tribunal:	Senior Member M Sripathy
Place:	Sydney
Date:	7 March 2025
Decision:	The Tribunal remits the application for a Child (Migrant) (Class AH) visa for reconsideration, with the order that the visa applicant meets the following criteria for a Subclass 101 (Child) visa: • PIC 4020 for the purposes of cl. 101.223 of Schedule 2 to the Regulations; and • cl 101.213 of Schedule 2 to the Regulations; and • cl 101.221(2)(b) of Schedule 2 to the Regulations.

Statement made on 07 March 2025 at 2:43pm

CATCHWORDS

MIGRATION – Child (Migrant) (Class AH) visa – Subclass 101 (Child) – false or misleading information or bogus document – study since turning 18 – certificate of course completion – verification check – no contact with provider made and visa applicant’s communication difficulties during phone conversation – further statements and documentation provided – study at times of application and decision – compassionate or compelling circumstances justifying waiver – review applicant’s health – joint hearing with brother’s review as secondary applicant on mother’s partner visa – decision under review remitted

LEGISLATION

*Migration Act 1958 (Cth), ss 5(1), 65
Migration Regulations 1994 (Cth), Schedule 2, cls 101.213(1), 101.221(2)(b), 101.223, Schedule 4, criterion 4020(1), (5)*

CASES

Flomo (Migration) [2024] AATA 901
Hussain v MIBP [2017] FCCA 3247
MIAC v Henschel [2013] FCCA 584
Opoku-Ware v MIBP (2015) 297 FLR 416
Sahr (Migration) [2021] AATA 1319
Sandhu v MIMAC [2013] FCCA 491
Sharma v MIMAC [2013] FCCA 1280
Singh v MIMAC [2013] FCCA 1435
Sok v MIMIA [2005] FMCA 190
Sun v MIBP [2016] FCAFC 52
Talukder v MIAC [2009] FMCA 223
Wake v MIAC [2010] FMCA 272

Statement of reasons

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 18 September 2024 to refuse to grant the visa applicant a Child (Migrant) (Class AH) Subclass 101 visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The visa applicant applied for the visa on 16 May 2023. The delegate refused to grant the visa on the basis that the delegate found the certificate of completion relating to a course claimed to be completed at Digiphonics Technology was a bogus document and did not meet PIC 4020(1) and was not satisfied the adverse impact on the applicant's parents health was sufficiently compassionate or compelling to justify waiver of the provision.
3. The sponsor applied for review of the decision to the Administrative Appeals Tribunal on 7 October 2024. On 14 October 2024, the Administrative Appeals Tribunal (AAT) became the Administrative Review Tribunal (the Tribunal). Under the transitional provisions in the Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Act 2024 (the Transitional Act), proceedings in the AAT that were not finalised before 14 October 2024 are to be continued and finalised by the Tribunal. Anything done in relation to the proceeding before 14 October 2024 is taken to have been done by the Tribunal.
4. The review applicant appeared before the Tribunal by video hearing on 26 February 2025 to give evidence and present arguments. The hearing was conducted as a combined hearing with a related review application of the same review applicant in respect of his elder son's refusal as a secondary visa applicant for a Partner (Subclass 309/100) visa (ART case ref. 2304833). The Tribunal also received oral evidence from the visa applicant and the visa applicant's mother (review applicant's wife). The Tribunal hearing was conducted with the assistance of an interpreter in the Tamil (Sri Lankan) and English languages.
5. The review applicant was represented in relation to the review.
6. For the following reasons, the Tribunal has concluded that the decision under review is set aside and the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. *Evidence before the Department*

8. The visa applicant is a 26-year-old single male, born in Trincomalee, Sri Lanka and now residing in Chennai, India. He was 24 years old at the time the application was made. He declares a mother and older brother residing in India, and a father in Australia. The visa applicant indicates he has lived in India since June 2006, for safety and study. He is sponsored by his father (review applicant) who is an Australian citizen by grant, having arrived in Australia in 2009. The sponsor lodged a sponsorship form 40SP.
9. In his application the visa applicant declares the following education: he completed the equivalent of year 12 secondary school at Our Lady Matriculation Higher Secondary School in April 2016. Following this, he completed a Bachelor of Technology in Automobile Engineering from June 2016 to December 2020; then a software development course from January 2021 to June 2022 at Digiphonics Technology and is currently enrolled in a Diploma in X-Ray Technology from August 2022 to June 2024 at IDA Allied Health Academy.

10. He is not employed, nor is he incapacitated for work due to the total or partial loss of bodily or mental functions. He declares he is fully financially supported for food, shelter and all other financial needs by his father from birth to the present time.
11. On 23 February 2024 the Department undertook verification checks relating to the applicant's claimed education history. A file note record of the checks undertaken is included in the Department file.¹ In the course of these checks an officer undertook an open-source search for the IDA Institute Health Academy for which only phone and address details, no website, was located. The number was called, questions asked about the institute and nature of courses. The applicant was verified by name as a current student, and his contact details were forwarded by request.
12. The officer called the applicant by phone and notes are provided of the interview that ensued. The officer noted various concerns arising from the interview. The visa applicant stated he resides in Chennai and it takes him 1.5 hours by bus to get to the academy in Vellore; it is recorded that he gave inconsistent answers from the course directors about the number of students in his course and timing of the classes. In response to questions about what he was doing after his engineering course, the notes record he stated that due to COVID he took a gap and joined a 3-month diploma course in 2021 called Diagnosis Technology. He denied pursuing any long-term course in 2021-2022 and said it was an online course only. He is recorded as denying knowledge about the Full Stack Web Development course, claimed in his application.
13. The file record notes the cumulative concerns of the officer and the referral was finalised as 'serious concerns'.
14. By letters dated 21 March 2024 and 24 April 2024, the Department invited the applicant to comment on adverse information. The second letter was a re-issue of the first due to concerns expressed by the applicant's representatives regarding errors and insufficient particulars. The second letter indicated that the adverse information raised concerns about whether the applicant meets the study requirement in cl.101.213 and may indicate that he provided a bogus document and/or false or misleading information for the purposes of PIC 4020(1).
15. On 10 April 2024 the applicant provided a submission from his agent in response to the natural justice letter and the following supporting documents:
 - A Statement by the visa applicant, dated 9 April 2024;
 - letter from IDA Allied Health Academy, dated 3 April 2024;
 - letter from Digiphonics Technology stating the non-functional mobile during the time Department tried to make contact;
 - Digiphonics Technology Tax income record;
 - hand written assessments in the name of the applicant dated 20 May 2022 to 30 May 2022;
 - visa applicant's photo ID card from Digiphonics Technology valid till May 2024;

¹BCC20232786045 OPD2024/95815

- various statements from fellow students at Digiphonics Technology, with photo ID cards;
- a medical certificate for the applicant dated 03 April 2024;
- a pharmacy invoice dated 22 February 2024;
- evidence of the visa applicant's cleft palate condition.

16. Between 24 July 2024 and 16 September 2024, the applicant provided a further submission from his agent and the following supporting documents:

- Further evidence of visa applicant's cleft palate condition;
- letter of Support from Service for the NSW Treatment and Rehabilitation of Torture and Trauma Survivors (STARTTS) of Umashanthini Subakaran , dated 14 May 2024;
- statement of support and ID of B Karapagam, dated 13 May 2024, former principal of applicant's secondary high school, confirming issues the applicant had with voice, speech and pronunciation due to his cleft palate condition;
- Ria Money Transfers, dated 7 March 2024;
- evidence of applicant's course completion of the IDA Health Academy course, including Diploma in X-Ray Technology Certificate, Course Completion Certificate and Statement of Marks of Luxshan Subakaran, dated 10 May 2024;
- evidence of current study: Bonafide Certificate for Maya Software Modelling Specialization course dated June 2024 – May 2025, and Fee Receipt for that course dated 29 June 2024 (INR 129800);
- copies of AAT decisions in Flomo (Migration) [2024] AATA 901 (12 April 2024) and Sahr (Migration) [2021] AATA 1319 (19 March 2021);
- further evidence of review applicant and his wife's health conditions in Australia;
- Digiphonics Technology letter dated 12 August 2024 confirming applicant's course completion;
- course receipt for applicant's current Maya Software Modelling Specialization course dated 12 August 2024 (INR124490).

17. The delegate refused the application in a decision made on 18 September 2024 after considering the evidence and responses, finding that the applicant gave a bogus document and therefore did not meet PIC 4020(1) and the delegate was not satisfied on the material provided that the impact of a refusal on the applicant's parents' health was sufficiently compassionate or compelling circumstances to justify waiver.

18. Evidence before the Tribunal

19. On 17 December 2024 the applicant's representative provided detailed submissions, referring to supporting documentation provided to the Department and additional supporting

documentation to the Tribunal. The representative requested expedited processing of the review application. Included in this material was updated material regarding the serious and deteriorating mental health condition of the review applicant. The matter was granted priority on this basis.

20. The additional documents provided to the Tribunal included:

- Statement of Subakaran Sivapalan, dated 12 December 2024;
- Statement of Luxshan Subakaran, dated 15 December 2024;
- Statement of Umashanthini Subakaran, dated 12 December 2024;
- Passport of Luxshan Subakaran, updated with the Department in November 2024;
- Letter of Support from Rev. Dr. John Jegasothy, dated 14 October 2024;
- Bridgeview Medical Practice GP letter of Subakaran Sivapalan, dated 5 November 2024;
- Letter of Support from the NSW Service for the Treatment and Rehabilitation of Torture and Trauma Survivors for Umashanthini Subakaran, dated 29 October 2024;
- Clinical Report of Manashasthra Integrated Mind Care for Luxshan Subakaran, dated 26 October 2024;
- Bundle of receipts of payment for Manashasthra Integrated Mind Care for Luxshan Subakaran, September to October 2024;
- Medical reports of Umashanthini Subakaran;
- Bridgeview Medical Practice GP letter of Umashanthini Subakaran, dated 10 December 2024.

Evidence at hearing 26 February 2025

21. Having regard to the basis for the grant of priority processing of the application, the Tribunal arranged for the constitution of a related case, the review of the review applicant's elder son's refusal as a secondary visa applicant for a Partner (Subclass 309/100) visa (ART case ref. 2304833) and a combined hearing was arranged for both matters.
22. The Tribunal took oral evidence from the review applicant and his wife in person at the Sydney registry, and video evidence from the visa applicant. The hearing was conducted with the assistance of an interpreter in the Tamil (Sri Lankan) and English languages, and the interpreter was used throughout the hearing by all parties. The applicant and the witnesses gave their evidence separately. Over the course of questioning the parties in some depth over several hours, the Tribunal assessed the review applicant to be a credible and honest witness. He answered the Tribunal's questions spontaneously and without hesitation and advised the Tribunal frankly when he did not know the answer to a question. The Tribunal observed in the review applicant's presentation the intense emotion and distress the processing of his sons' visa applications over a prolonged period of years was causing him. His wife and the visa applicant also gave their evidence spontaneously and

openly, without hesitation, and provided responses to the Tribunal's questions and follow up questions in convincing and plausible detail. Their evidence was substantially consistent with and corroborative of each other. The Tribunal has no concerns about their integrity and found them all to be credible and honest witnesses. A summary of relevant evidence provided at hearing follows.

23. Evidence from review applicant

24. The review applicant lives with his wife in a house shared with his wife's brother and family. They were not currently in Australia, having gone overseas for medical treatment. He works as a drilling machine worker, on a full-time basis and has been employed in the same job for over 10 years. He also has a second casual job on Sundays, cutting grass. He said up until his wife arrived in Australia, he used the income from his second, Sunday, job for his personal expenses in Australia and sent the bulk of his remaining income to support his wife and two sons residing in India. He consistently sent between \$3000-\$4000 per month for many years. He continues to send money to support his sons. Since his wife's arrival in Australia in June 2023, she has been studying at TAFE. She is now in an aged care course, having previously taken English classes. She is not working.
25. He confirmed his family comprises his wife and two sons who are residing in India. His parents are both deceased. He has five living siblings in Sri Lanka. The review applicant came to Australia in 2009 to Christmas Island. He was granted permanent residency in 2010. He applied for citizenship in 2014 but due to a complication with the date of birth recorded on his travel document, the process of granting citizenship was delayed, and he did not obtain citizenship until 2017. His wife came to Australia in June 2023. Prior to coming here, she lived with their sons in Chennai, India. They rented properties at various addresses, moving around depending on where the boys were studying. The review applicant said she knows the details of the places and the institutions where the boys studied better than him. He explained that he is not educated, having left school at grade 2 and he cannot read. His wife is more highly educated, and she was in charge of taking care of the arrangements for their education. He worked to earn income and financially support them.
26. The review applicant was asked about the visa applicant's study history from secondary school onwards. He said he doesn't know the exact details, because as he explained before, his wife is the one who arranged it, he was just sending them money, but was aware that he lived at Valasaravakkam when he was doing his 'plus 2' and later they moved to Avadi when he was at college. He has been continuously studying since then. Around the time of his 21st birthday, the review applicant sent money to him to buy a two-wheeler so he could go to college by motorcycle. The review applicant believed he studied continuously and was not aware of any breaks or gaps in study. He is studying now, but the review applicant was unsure of the course. When asked if he talked to his son about his study, the review applicant became visibly distressed and emotional. He described that he loves his sons so much, he used to talk a lot to them but at some stage he could not answer their questions because of the limitations of his own education, and they talked less and less. He knows the visa applicant has a degree in the field of auto engineering.
27. The review applicant said the visa applicant has never worked, because he has been studying full time and has no time to work. The review applicant supports him fully and has been doing so throughout his study. He is not married or engaged to be married. He lives in a hostel close to his current institution. The review applicant pays the hostel fees. His brother is staying in Vellore, with his maternal aunty. The review applicant pays their rent. His elder son is not now studying, nor is he working. The review applicant continues to fully financially support them both.

28. *Evidence from visa applicant*

29. The witness confirmed his current address, in a hostel close to the institute where he is currently studying. He has been here since June 2024. The Tribunal noted he stated a different address in a recent statement provided to the Tribunal in December 2024. He said this was his aunty's address where his brother is staying. He moved to the hostel because it was too far to travel to his course. His father pays the hostel fees.
30. The Tribunal asked the visa applicant about his current course. He said it is a Maya software course. He provided a description of what the course was about and its relevance to his previous study, specifically his Bachelor degree in auto engineering, as it would be useful in the context of design for autos. The course runs until May 2025, he has a project to complete which if successfully completed he will receive a certificate of completion. If not his study will be extended. He attends classes for two hours each day and stays on to do independent work after that. There are daily assignments during the class, but otherwise the main assessment is the final project that is submitted at the end. He gets feedback on his progress from time to time.
31. Prior to this he completed a two-year diploma in X ray Technology. When asked why he did this course, he said he had an interest in this field since his school days but ended up in an engineering program instead. When he was required to study further, he decided to take this course because people advised him that it may be a useful skill overseas. Prior to this course he took a 15-month website development course at Digiphonics Technology. When asked why he did this course, the visa applicant said when at college he and his friends talked about having their own business. If they did that they would need a website. They could buy this from a third party or do it themselves. He thought it would be a useful skill to have for this reason. The Tribunal noted that among the documents he provided the Department were some handwritten assessments dated May 2022 and asked why only from this date. He said there were 5 subjects in the course and a final exam. There were no other projects or assignments. The visa applicant confirmed that he lived with his mother and brother during this course. The course involved face to face classes and he attended daily, including throughout the COVID period. He travelled to class by two-wheeler.
32. The Tribunal asked the visa applicant about the interview with the delegate in February 2024. He said he was studying in the X ray course at the time, he was at home because he was unwell that day. He had a fever and was vomiting. He told the officer that he was sick and that was why he wasn't at class. The interview was conducted in English. He told them he understands a little English but not that well. He explained that even in his own language his communication (speaking) is difficult (because of his cleft palate). They told him it's okay and proceeded anyway. The visa applicant said he remembers some things they asked about but not everything. They asked what he was doing after the engineering course and he told then he studied a one year and three month course.
33. The visa applicant told the Tribunal he has not taken any gaps in his study, He has studied continuously since secondary school. The current course costs more than one lakh rupees. His father has paid for all his education. The visa applicant told the Tribunal he has a cleft palate and last had an operation while he was at high school between 11 and 12th grades. He hasn't had any operations since then, but there are two more he needs to have.
34. The visa applicant confirmed that he does not work and has never worked. He is single and not married or engaged to be married.

35. *Evidence from review applicant's wife (visa applicant's mother)*

36. The witness confirmed that prior to coming to Australia she lived in Chennai with her two sons. She gave a history of the visa applicant's study since secondary school, confirming the name of his high school, and then he went on to do a degree in engineering in Avedi. After this course he decided to do a computer related course, because he thought it would be useful for him for the future. This was a 15-month, full time course, he was living with her at the time and he travelled to class by motorcycle. After that he did a n X ray course, this was farther away, about 2 hours and he commuted by bus. He chose this course also, because he was told it may be useful if he came to Australia. After that finished he has joined another course, in Maya 3 D animation and is studying full time.
37. The witness became visibly distressed when talking about the visa applicant's medical condition. He has had two or three operations already. She has never before been separated from her children and it is very hard for her, but her husband also needs her here. The separation is hard on all of them. The witness confirmed that the visa applicant has been studying continuously since school and has had no gaps in his study.
38. On 6 March 2025 the Tribunal received two documents of screenshots of course work relating to his current course of study. The representative submits this is evidence in support of his oral evidence regarding the current study he is undertaking, for which he is still in the process of completing a final course project.

CONSIDERATION

39. The application was refused on the basis that the delegate was not satisfied the applicant met cl.101.223 having found that PIC 4020(1) was not met and could not be waived.
40. It is a requirement of 101.223 that, among other Public Interest Criteria (PIC) the applicant satisfies PIC 4020 contained in clause 4020 in Schedule 4 of the *Migration Regulations 1994*.
41. The relevant provisions are as extracted below:

4020

(1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5-reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:

- (a) the application for the visa; or
- (b) a visa that the applicant held in the period of 12 months before the application was made.

(4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:

- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.

(5) In this clause:

information that is false or misleading in a material particular means information that is:

- (a) false or misleading at the time it is given; and
- (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

Bogus document is defined in Section 5(1) of the Migration Act as follows:

bogus document, in relation to a person, means a document that the Minister reasonably

suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

42. The delegate's decision was based on a suspicion that the Certificate of Completion from Digiphonics Technology was a bogus document. This in turn apparently was based on the visa applicant's responses during a phone interview with an officer in which he is alleged to have referred to having done a three-month course and did not appear to be familiar with the name of the course he had submitted evidence for. Despite numerous documents provided in response to this allegation, the delegate concluded the document was a bogus document.
43. Department file records provided to the Tribunal do not show that any contact was made, or even purported to be made with Digiphonics Technology. The verification steps undertaken were with the Institute the applicant was undertaking a course at the time of application, IDA Allied Health Academy, and the records appear to indicate that this contact verified his claims of that study, although despite this verification the officer formed a view that IDA Allied Health Academy may be facilitating the education claims. The Tribunal observes that no evidentiary basis for this suspicion is indicated or alluded to in the file records.
44. The visa applicant denies the allegation that he provided a bogus document and has consistently maintained that he undertook and completed a 15-month course at Digiphonics Technology. Numerous further documents were provided to the Department in support and the Tribunal has additionally had the benefit of taking oral evidence from the visa applicant and his mother and has assessed both as credible and honest witnesses.
45. PIC 4020 requires that there be no evidence before the Minister that the applicant has given a bogus document or information that is false or misleading in a material particular. The use of the word 'evidence' in PIC 4020 imposes a requirement that the facts conveyed by the material must be sufficiently probative to lead to the conclusion that information given in connection with the application for a visa is a bogus document or false or misleading in a material particular.²
46. Caselaw guidance on the construction of this provision provides that the consideration of 'evidence' requires an assessment of *the quality of* the evidence being relied on before finding whether an applicant fails to satisfy the criterion, and satisfaction that there is evidence is to be formed reasonably upon the material before it.³ However, the Tribunal accepts there is also caselaw authority that indicates there is a distinction between the evidence of giving 'information that is false or misleading in a material particular' and evidence of the giving of a 'bogus document' and that PIC 4020 only requires evidence that a bogus document has been submitted, not that a document that has been submitted is bogus. If a document which is found to be bogus under the 'relatively undemanding test' of 'reasonable suspicion' has been submitted in connection with a visa application, no more is needed to show that there is 'evidence' of the sort referred to in PIC 4020(1).⁴

²*Sharma v MIMAC* [2013] FCCA 1280 at [33]–[37].

³*Talukder v MIAC* [2009] FMCA 223, cited with approval in the context of PIC 4020 in *Sandhu v MIMAC* [2013] FCCA 491 and *Sharma v MIMAC* [2013] FCCA 1280 at [39].

⁴*Singh v MIMAC* [2013] FCCA 1435 at [25]; *Sun v MIBP* [2016] FCAFC 52 per Logan J at [21] where the Full Court rejected an argument that the requirement that there be 'o evidence' imposed an onus or burden on the Tribunal of proving that a document was bogus, per Flick and Rangiah JJ at [73]–[75], Logan J agreeing.

47. In the present case, the Tribunal, on all the material now before it, has reached a different view to the delegate on whether there is evidence that the Digiphonics Technology Certificate of Completion is a bogus document as defined in s 5. On the available material now before it the Tribunal does not reasonably suspect this document to be a bogus document.
48. The Tribunal is satisfied the applicant undertook and completed the 15 months Software Full Stack Developer course at Digiphonics Technology as claimed. In reaching this conclusion, the Tribunal accepts the submissions and arguments submitted by the applicant's representative regarding the questionable circumstances of the conduct and record of the department officer's interview with the visa applicant, and it has not therefore placed any reliance on the information contained in this record held on the Department file. The Tribunal has had the benefit of taking evidence from the visa applicant by video with the assistance of an interpreter in the Tamil language, together with further supporting documents from Digiphonics Technology and evidence of the applicant's assessments and mark results. Having regard to all of this evidence, the Tribunal has no reasonable suspicion that the document submitted is a bogus document.
49. There is no other evidence, of a sufficiently probative nature before it that the applicant has given, or caused to be given, a bogus document or information that is false or misleading in a material particular.
50. Therefore PIC4020(1) is met, for the purposes of cl.101.223.
51. Although not necessary, in light of the above finding that PIC 4020(1) is met, for the sake of completeness the Tribunal, contrary to the delegate's finding, is satisfied that there are compassionate or compelling circumstances that affect the interests of an Australian citizen (the review applicant) and an Australian permanent resident (his wife) that would justify the granting of the visa pursuant to PIC 4020(4), if PIC 4020(1) was found not to be met. The Tribunal's conclusion in respect of the waiver provision is based on the review applicant and his wife's compelling oral evidence and it's observation of the genuine and deep emotional and psychological distress caused by the ongoing separation from their sons. The medical and psychological reports and support letters before the Tribunal support this conclusion. There is sufficient evidence that the significant impact on the review applicant's mental health is a compassionate and compelling circumstance to justify waiver in this case.

52. Criteria for applicants over 18

53. If, at the time of application, the visa applicant has turned 18, they need to meet certain requirements relating to relationships, work and study: cl 101.213. These requirements must continue to be met at the time of decision: cl 101.221(2)(b).⁵

Relationship status and history

54. At the time of application, the visa applicant must not be engaged to be married and must not have or ever have had a spouse or de facto partner: cl 101.213(1)(a). This must continue to be the case at the time of this decision: cl 101.221(2)(b).
55. On the evidence provided in the application, to the Department and to the Tribunal at hearing the Tribunal is satisfied that the visa applicant is currently and was at time of application, not married or engaged to be married and has never had a spouse or de facto partner.
56. Accordingly, cl 101.213(1)(a) is met and continues to be met at the time of decision.

⁵The visa applicant must be studying at the time of decision: *Opoku-Ware v MIBP* (2015) 297 FLR 416.

Not engaged in full-time work

57. At the time of application, the visa applicant must not be engaged in full-time work: cl 101.213(1)(b). This must continue to be the case at the time of this decision: cl 101.221(2)(b).
58. On the evidence of the financial transfers provided to the Department and Tribunal and evidence to the Tribunal from the review and visa applicant and witness at hearing confirming his ongoing financial support, the Tribunal is satisfied the visa applicant has not been engaged in full time work to date.
59. Accordingly, cl 101.213(1)(b) is met and continues to be met at the time of decision.

Full-time study (or incapacitated for work)

60. At the time of application, the visa applicant must have, since turning 18, or within 6 months or a reasonable time after completing the equivalent of year 12 in the Australian school system, been undertaking a full-time course of study at an educational institution leading to the award of a professional, trade or vocational qualification: cl 101.213(1)(c). This requirement does not apply in the case of applicants who, at the time of making the application, were incapacitated for work due to the loss of bodily or mental functions: cl 101.213(2). There is no claim that this alternative applies in this case.
61. Various cases have considered the proper construction of cl.101.213 (and its equivalent in cl.802.214). Relevantly for the present matter, in *MIAC v Henschel* [2013] FCCA 584, the Court found that there was nothing ambiguous about the requirements of the legislation, considering that ‘...[e]ither the applicant [had], since turning 18, been undertaking a full-time course of study...or he [had], within six months or a reasonable time after completing the equivalent of year 12 in the Australian school system, been undertaking a full-time course of study’, at [7]. The Court found in that case the Tribunal overlooked the requirements of cl 802.214 of whether the applicant was at the relevant time undertaking a fulltime course of study as described in the Regulations, at [10] and that the subsidiary enquiry was whether the study had been undertaken within the appropriate temporal limits at [11]. In determining what is a ‘reasonable time’ for cl 101.213(1)(c), it is relevant to consider the surrounding circumstances including the actual time involved, what activities were undertaken during that time, the purpose for which those activities were undertaken and, if no relevant activities were undertaken, the reason why: *Sok v MIMIA* [2005] FMCA 190 at [19]. The meaning of ‘since’ in the first of the above two alternative temporal limits (which would apply if the applicant has not completed the equivalent of Year 12) was considered in the judgement of *Wake v MIAC*.⁶ The Court held that ‘since’ in this context was used in the sense of ‘continuously from’ the event of turning 18 and rejected the submission that it meant ‘at any time after’ turning 18.⁷
62. In the present case, the visa applicant turned 18 in August 2016 when he was still in secondary school. He completed the equivalent of year 12 in April 2016 and therefore the second of the two temporal limits apply in his case. The Tribunal finds that he commenced a Bachelor of Technology in Automobile Engineering in June 2016, within the 6 months temporal limit, which he completed and was awarded the qualification for in December 2020.
63. Following this course, the applicant claims, and the Tribunal accepts, he completed a 15-month software development course from Digiphonics Technology. Following the end of this

⁶*Wake v MIAC* [2010] FMCA 272.

⁷*Wake v MIAC* [2010] FMCA 272 at [25]–[26]. The Court held that this interpretation was from the ordinary meaning of the word having regard to the language and immediate legislative context.

course in June 2022, he enrolled in and commenced the Diploma in X-ray Technology at IDA Allied Health Academy in August 2022, which he was undertaking at the time of application, 16 May 2023.

64. Therefore, the Tribunal accepts that the visa applicant in this case has been continuously engaged in relevant full time study since completing the equivalent of year 12, although arguably continuous study is not necessarily required by the provision.⁸ In *Hussain v MIBP*, considering the time of decision requirement, the Court held that the phrase 'has, since turning 18... been undertaking' in cl 101.213(1)(c), both in itself and read with the requirement in cl 101.221(2)(b) that a visa applicant 'continues to satisfy', requires the decision-maker, when considering the criteria at the time of decision, to look at the time period from the visa applicant commencing study within cl 101.213(1)(c) until the time of the decision and ask whether, characterised as a whole, the visa applicant's conduct in that period warrants the conclusion that the visa applicant has been undertaking relevant study in that period.⁹ The authority in *Hussain* supports the proposition that there is no requirement for an applicant to have been 'continuously involved' in study from the time of commencement of their studies and up until the time of decision,¹⁰ although another authority makes clear that the visa applicant must be studying at the time of decision: *Opoku-Ware v MIBP* (2015) 297 FLR 416.
65. The Tribunal finds that that the applicant was enrolled in and undertaking, a Diploma in X-ray Technology at IDA Allied Health Academy at the time of application, 16 May 2023, and by this course he met cl.101.213(1)(c) at time of application.
66. At time of decision, the Tribunal finds that the applicant is enrolled in and undertaking full time study in the Maya Software Specialisation course. He continues to not be engaged to be married and has not had, nor ever had, a spouse or de facto partner and there is no evidence that he is engaged in full time work. Therefore, he continues to be meet the requirements of cl.101.213 at time of decision: cl 101.221(2)(b).
67. Given the findings above, the appropriate course is to remit the matter to the Minister to consider the remaining criteria for the visa.

DECISION

68. The Tribunal remits the application for a Child (Migrant) (Class AH) visa for reconsideration, with the order that the visa applicant meets the following criteria for a Subclass 101 (Child) visa:
- PIC 4020 for the purposes of cl. 101.223 of Schedule 2 to the Regulations; and
 - cl 101.213 of Schedule 2 to the Regulations; and
 - cl 101.221(2)(b) of Schedule 2 to the Regulations.

⁸ No specific authority appears to have considered whether there is a requirement for continuous study in circumstances where the applicant has commenced relevant study within one of the two temporal limits and is undertaking relevant full time study at time of application. The judgement in *Wake* referred to above, relates to the interpretation of 'ince' in the context of the first wing (where the applicant did not completed the equivalent of year 12).

⁹*Hussain v MIBP* [2017] FCCA 3247 at [111].

¹⁰The Tribunal in the matter of *Hussain* was found to have erred by adopting this construction: *Hussain v MIBP* [2017] FCCA 3247 at [114]. See also *Khan v MICMA* [2023] at [74].

Date of hearing: 26 February 2025
Representative for the Applicant: Mr Dushan Nikolic